NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 7
and	)
	) Award No. 15
UNION PACIFIC RAILROAD COMPANY	)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: May 12, 2000

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier failed and refused to allow time and one-half payment for overtime service or double time payment for double time service in connection with the twenty cents ($.20) differential alowance for vehicles equipped with hy-rail attachments (System FileN-286/1014215).

2 As a consequence of the violation referred to in Part (1) above, all Union Pacific truck operators assigned to vehicles with hy-rail attachments shall now receive an additional ten cents ($.10) per hour for all time and one-half hours worked and an additional twenty cents ($.20) per hour for all double time hours worked beginning sixty (60) days retroactive from March 18, 1996, i.e., the date this claim was filed, and continuing until the violation ceases.

FINDINGS:

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

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An Agreement between Carrier and the Organization that took effect August 16, 1993, governed various truck operator positions. The Agreement provided, among other things, that certain truck operators assigned to operate vehicles with hy-rail attachments would receive differential allowances of $.20 per hour. It is undisputed that since the effective date of the Agreement, Carrier has excluded the twenty cent differential in computing overtime and double time compensation. On March 18, 1996, the Organization filed a claim contending that the exclusion of the differentials from overtime and double time calculations violated the Agreement.

Carrier contends that the claim should be dismissed as untimely. The Organization responds that the claim is for a continuing violation. Carrier urges that the differential is paid on top of either the straight time or premium rate otherwise paid the truck operator. The Organization contends that the differential is part of the rate of pay on which overtime and double time calculations are to be based.

We consider the timeliness issue first. Rule 49(a) requires that claims be presented "within 60 days from the date of the occurrence on which the claim or grievance is based." Rule 49(b) provides:

> A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than sixty (60) days prior to the filing thereof. . . .

The parties disagree over whether the instant claim raises a continuing violation. Each party has presented numerous awards that it contends supports its position. We have considered all of the authority presented by the parties. The awards demonstrate that the line between continuing and non-continuing violations can be a difficult one to draw at times. However, the key to drawing that line, in the first instance, is properly defining the alleged violation. If the alleged violation is a discrete act, the fact that the act continues to have consequences for a lengthy period of time does not make it a continuing violation. On the other hand, if the alleged violation is repeated multiple times over a lengthy period, a continuing violation exists.

For example, if Carrier is alleged to have violated the Agreement by subcontracting certain work, it is the act of subcontracting that constitutes the alleged violation. The employees experience the effects of the alleged violation as long as the contractor continues to perform service on the job in question, but the fact that the contractor works for several months does not convert the claim to a continuing violation. Similarly, if Carrier is alleged to have violated the Agreement by promoting an employee with less seniority than the claimant, the alleged violation is the promotion. Each day that the junior employee occupies the position has adverse consequences for the claimant, but that does not convert the claim into a continuing violation.

In the instant case, however, the alleged violation is the failure to pay overtime and double time on the twenty cent differential. If the claim is valid, each time Carrier pays overtime or double time, it has a duty under the Agreement to include the differential in the premium pay calculation. The alleged violation is the payment itself, as opposed to the letting of a subcontract or the promotion of a junior employee. Each allegedly inadequate payment is a new violation. Accordingly, we agree with the Organization that the claim alleges a continuing violation and is properly before us.

Carrier has raised concerns that construing the claim to allege a continuing violation leaves it vulnerable to claims being pressed even as late as ten years after the fact. We do not agree. Even where a continuing violation is raised, the doctrine of laches bars the adjudication of stale claims where the Organization has slept on its rights. Laches was not raised during handling on the property or before this Board and we have no occasion to consider it in the instant case.

We turn to the merits of the claim. Section 7 of the August 16, 1993, Agreement contains a table in which various truck operator positions are listed, along with columns presenting their straight time and premium O.T., which in each case is one and one-half times the straight time rate listed for the position. Section 8 provides:

> Employes assigned to Truck Operator positions identified in Groups 14, 15 and 19 of Section 7 of this Memorandum of Agreement will receive a differential allowance of twenty (20) cents per hour when qualified and assigned to operate a vehicle equipped with hy-rail attachments.

Both parties seek support for their positions in the handling of a July 31, 1979 Letter Agreement concerning lead grinders. That Letter Agreement provided, in relevant part:

> This will serve to confirm my earlier advice that the Carrier is agreeable to establishing a position of 'Lead Grinder' at a current rate of $8.03 per hour, including cost of living adjustments, effective August 1, 1979, which represents a 15 cent per hour differential over the position of RTPMO, Position Code No. 347.

The parties agree that overtime and double time have been paid on the fifteen cents per hour differential for Lead Grinders.

With all due respect to the parties, we find that the handling of Lead Grinders is not particularly helpful in resolving the instant dispute. Carrier correctly points out that the Letter Agreement expressly created a new rate of pay for Lead Grinders and specified that rate in dollars and cents. In contrast, the August 16, 1993, Agreement did not express new rates of pay for truck operators with vehicles having hy-rail attachments in dollars and cents. It merely stated that such operators would receive twenty cents per hour differentials. Therefore, the overtime and double time pay calculations for Lead Grinders do not control the instant case. However,

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merely because the language establishing hy-rail attachment differentials for truck operators is different from the language establishing the new position of Lead Grinder, it does not follow that the hy-rail attachment differentials are to be excluded from overtime and double time calculations. To resolve that issue, we must turn to the premium pay provision of the Agreement.

Rule 35(a) provides:

> Time worked preceding or following and continuous with the regular eight (8) hour assignment shall be computed on an actual minute basis and paid for at time and one-half rate with double time applying after sixteen (16) hours of continuous service, until relieved from service and afforded an opportunity for eight (8) or more hours off duty.

The clear general command of Rule 35(a) is that employees who work more than eight continuous hours in a day are to be paid at their "time and one-half rate," and that employees who work more than sixteen continuous hours are to be paid double time. Section 7 lists overtime rates for each truck operator position. The differential for qualified truck operators assigned to vehicles equipped with y-rail attachments is isolated in a separate section, Section 8. Carrier urges that if overtime were to be paid on the differential, the differential would have been incorporated into a new rate of pay in Section 7. It is possible that the parties had some other reason for isolating the differential in a separate section, but no other reason is offered in the record. Therefore, we conclude that the differential is to be paid on top of time and-half and double time, rather than to be paid subject to time and one-half and overtime premiums.

AWARD

Claim denied.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, January 29, 2001.